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STATE OF NEW MEXICO
BEFORE THE SECRETARY OF THE ENVIRONMENT

WILLOW LAKE GAS PLANT (CRESTWOOD, NEW MEXICO) FOR AN AIR QUALITY PERMIT, NO. 5142-M8 — AQB 21-38

WILDEARTH GUARDIANS' CLOSING ARGUMENT AND FINDINGS OF FACT AND CONCLUSIONS OF LAW

CLOSING ARGUMENT

INTRODUCTION

Ambient air quality in southeast New Mexico is exceeding or very nearly exceeding the federal air quality standard for ozone.[1] Indeed, parts of southeast New Mexico have violated this ozone standard.[2] This is significant because ozone pollution beyond this standard can seriously harm public health by decreasing lung function, causing respiratory inflammation, exacerbating asthma and allergies, and can even lead to hospitalizations and premature death.[3] For this and other reasons, there is significant public interest in air quality permits that would authorize oil and gas facilities to increase emissions of air contaminants that would lead to more ozone formation. The September 2021 rulemaking hearing before the New Mexico Environmental Improvement Board, EIB No. 21-27, which proposed stricter ozone-related pollution regulations for the oil and gas industry, is a recent example of the seriousness of this issue and the public's interest and concern.

In light of this air quality problem in New Mexico, WildEarth Guardians ("Guardians") requested a public hearing to ensure that the construction permit proposed for the Willow Lake

[1] Guardians Exhibit 3 at 4.
[2] *Id.*
[3] U.S. EPA, National Ambient Air Quality Standards for Ozone, 80 Fed. Reg. 65292, 65303-11 (Oct. 26, 2015).

Gas Plant ("Facility") complies with the laws, rules, and standards of the New Mexico Air Quality Control Act ("AQCA") and the federal Clean Air Act ("federal act"), as well as to ensure the New Mexico Environment Department ("Department") issued the permit in accordance with the law. In testimony and at the two-day hearing commencing on October 25, 2021, Guardians brought forward an affirmative case, explaining why the proposed emissions limits for startup, shutdown, maintenance, and malfunction ("SSM/M") do not comply with the applicable legal requirements and why the Department's action to issue this permit would not be in accordance with Executive Order 2005-056 ("EO 2005-056"). For these reasons, Guardians respectfully requests the Cabinet Secretary to direct the Department to address the deficiencies in the proposed permit or deny the permit application.

I. Background and Procedural History

On February 19, 2021, Crestwood New Mexico Pipeline LLC ("Applicant" or "Crestwood") filed an application to modify its construction permit for the Willow Lake Gas Plant and, in doing so, increase the facility's emissions of nitrous oxides and volatile organic compounds ("VOCs"), among other air contaminants.[4] Concerned about the prospect of further increasing ozone precursors in a part of New Mexico that has demonstrated recent violations of the National Ambient Air Quality Standard ("NAAQS") for ozone, Guardians reviewed the application proposal and submitted written public comments on April 16, 2021, raising questions about the permit application and requesting a public hearing.[5] Guardians' comments raised a number of questions and concerns with the permit application, regarding legal notice, compliance with state and federal air regulations, among other issues. The Department released the draft permit and statement of basis for the Facility on May 28, 2021, and based on this

[4] 21-38_AR001-247.
[5] 21-38_AR500-503.

information Guardians filed a second set of written public comments, again, raising questions about the permit application, as well as the proposed permit, and requesting a public hearing.[6] The Department did not substantively respond to either set of Guardians' comments until October 12, 2021, when the Department filed its Statement of Intent to Present Technical Testimony.[7]

Based on Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, New Mexico Environment Department Cabinet Secretary, James Kenney ("Cabinet Secretary") granted a public hearing for Crestwood's application 5142M8 in a Public Hearing Determination dated June 1, 2021.[8] On June 24, 2021, the Cabinet Secretary subsequently ordered the public hearing be held in the matter AQB 21-38 and appointed Gregory Chakalian to serve as Hearing Officer in this matter.[9] Following a July 7, 2021 scheduling conference, the Hearing Officer consolidated AQB 21-38 with nine separate cases regarding construction permit applications for nine other oil and gas facilities in southeast New Mexico.[10]

As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone NAAQS in Eddy and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.[11] On October 25, 2021, the first

[6] 21-38_AR504-509.
[7] AQB 21-31 et al. Hearing Transcript, Volume 2 (October 26, 2021) ("Day 2 Transcript") at 315; *see also* Guardians Amended Exhibit 1 at 6.
[8] New Mexico Environment Department, *Public Hearing Request Determination for WEG Related Permit Applications* (Jun. 1, 2021).
[9] Notice Hearing and Appointment of Hearing Officer, AQB 21-38 (Jun. 24, 2021).
[10] Scheduling Order, AQB 21-31 et al. (Jul. 20, 2021).
[11] Joint Motion in Limine, AQB 21-31 et al. (Oct. 12, 2021).

day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing Final Order EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.[12] As a result of the Hearing Officer's order, Guardians redacted its witness's written testimony, where it discussed this issue, and did not present further testimony or evidence on this issue during the public hearing.

Along with the Joint Motion in Limine, on October 12, 2021 the parties also filed Statements of Intent to Present Technical Testimony in AQB 21-38. As mentioned above, these filings were the first substantive response to Guardians public comments since it filed its first set of comments on April 16, 2021. The Applicant's and the Department's Statements of Intent to Present Technical Testimony helped to resolve several concerns Guardians had raised in its earlier public comment letters, and Guardians, accordingly, focused its testimony during the public hearing on two remaining issues of concern with regard to Crestwood's application – the proposed SSM/M emission limits for venting gas and the Department's compliance with New Mexico Executive Order 2005-056.[13]

[12] AQB 21-31 et al. Hearing Transcript, Volume 1 (October 25, 2021) ("Day 1 Transcript") at 40, 61-63. We note that the Hearing Officer did not grant the Joint Motion in Limine for the reasons stated in the Joint Motion but rather granted the motion, *sua sponte*, on the two grounds explicated by the Hearing Officer.

[13] We note that the Final Order in EIB 20-21 and 20-33 did not address our concerns about ozone with regard to the Facility's proposed permit, but Guardians did not present testimony and evidence on this issue due to the Hearing Officer's order granting the Joint Motion in Limine.

A two-day virtual hearing was held on October 25 and 26, 2021. This post-hearing submittal is timely-filed in accordance with 20.1.4.500 NMAC and the Hearing Officer's oral order on October 26, 2021, setting the deadline for post-hearing filings for 30 days from the Notice of Transcript Filing. The Notice of Transcript Filing was filed on November 1, 2021.

II. Burden of Persuasion

For the purposes of the public hearing in AQB 21-38, the New Mexico Administrative Code establishes a burden of persuasion for each of the parties in this case – the Applicant, the Department, and Guardians. 20.1.4.400A.(1) NMAC. As the permit applicant, Crestwood must prove that the proposed permit should be issued and not denied. *Id.* This burden does not shift. *Id*.

Separately, the Department "has the burden of proof for a challenged condition of a permit," which the Department has proposed. *Id*. For purposes of Guardians' argument that the SSM/M emission limits are inadequate, improper, and invalid, Guardians must present an affirmative case on the challenged condition. *Id*. The Hearing Officer must determine each matter in controversy by a preponderance of the evidence. 20.1.4.400A.(3) NMAC.

The Environment Department's Permit Procedure regulations do not establish a burden of proof for issues that do not involve a specific permit condition. *See id*. at A(1).

III. Standard of Review

When taking administrative action, the Secretary and the Department must fundamentally ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; is supported by substantial evidence in the record; and is otherwise in accordance with law. NMSA 1978 § 74-2-9(C). "A ruling by an administrative agency is arbitrary and capricious if it is

unreasonable or without a rational basis, when viewed in light of the whole record." *Rio Grande Chapter of Sierra Club v. New Mexico Mining Comm'n*, 133 N.M. 97, 104.

In addition to the Department's standards for administrative actions, the Air Quality Control Act, NMSA 1978, § 74-2-7C, and the pre-construction permitting rule, 20.2.72 NMAC, establish additional reasons why the Secretary and the Department may or must deny an application for a proposed construction permit. According to section 74-2-7C NMSA, the Department may deny an application for a construction permit if it appears that the construction or modification:

> (a) will not meet applicable standards, rules or requirements of the Air Quality Control Act or the federal act;
>
> (b) will cause or contribute to air contaminant levels in excess of a national or state standards or, within the boundaries of a local authority, applicable local ambient air quality standards; or
>
> (c) will violate any other provision of the Air Quality Control Act or the federal act.

Pursuant to the New Mexico pre-construction regulations, the Department also must deny an application for a permit or permit revision based on eight independent factors, which include:

A. It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act;
B. The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board;
C. For toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC;

D. The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable;

E. The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment;

F. Any provision of the Air Quality Control Act will be violated;

G. It appears that the construction of the new source will not be completed within a reasonable time; or

H. The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

20.2.72.208 NMAC.

ARGUMENT

I. The proposed SSM/M emission limits will not meet the applicable requirements of the AQCA or the federal act.

Permit limitations established in a permit issued pursuant to an EPA-approved State Implementation Plan ("SIP") must be practically enforceable. Here, the proposed startup, shutdown, and maintenance and malfunction ("SSM/M") emission limits for the Facility are not practically enforceable and, accordingly, the proposed permit must be revised or denied.

Practical enforceability is a fundamental element of permit limitations in permits issued pursuant to an EPA-approved SIP. Without practically enforceable permit limitations, air pollution control agencies would be unable to ensure facilities comply with applicable air

pollution laws and regulations established to ensure air quality standards are met and air pollution is prevented or abated – two duties set out in the AQCA. *See* NMSA § 74-2-5A. and B.(1). Further, practically enforceable permit limitations are also used to prevent an emission source from qualifying as a major source by restricting the source's potential to emit below the major source threshold. However, to appropriately limit a source's potential to emit, only permit limitations that are both practically enforceable (enforceable as a practical matter) and federally enforceable may be considered.[14]

A permit limitation is federally enforceable if it is contained in a permit issued pursuant to an EPA-approved permitting program or a permit directly issued by EPA, or has been submitted to EPA as a revision to a State Implementation Plan and approved by EPA as such.[15] To be practically enforceable, a permit limitation must be consistent with at least three criteria set out by the EPA. A source-specific permit term must specify:

1) a technically accurate limitation and the portions of the source subject to the limitation;
2) the time period for the limitation (hourly, daily, monthly, annually); and
3) the method to determine compliance including appropriate monitoring, record keeping and reporting.[16]

The third criterion is essential to practical enforceability because without a specific method to determine compliance, there is no assurance that the data necessary for compliance determinations will be accurately and properly collected.[17] The proposed permit limits for

[14] U.S. EPA, *Guidance on Limiting Potential to Emit in New Source Permitting* (Jun. 13, 1989) at 1-2, www3.epa.gov/airtoxics/pte/june13_89.pdf.
[15] *Id*.
[16] U.S. EPA, *Guidance on Enforceability Requirements for Limiting Potential to Emit through SIP and §112 Rules and General Permits* (Jan. 25, 1995) at 6.
[17] *See* Hu Honua Bioenergy Facility, Petition No. IX-2011-1 (Feb. 7, 2014) at 10, epa.gov/sites/default/files/2015-08/documents/hu_honua_decision2011.pdf; *see also* U.S. EPA, *Guidance on Limiting Potential to Emit in New*

SSM/M emissions for venting gas from the Facility do not specify a method to determine compliance.

Section A107 of the proposed permit sets out emission limits for SSM/M events.[18] In particular, section A107 proposes that annual emissions of VOCs and H2S from venting gas due to SSM/M total no more than 10 tpy and 1 tpy, respectively. Section A107C establishes additional monitoring, recordkeeping, and reporting requirements necessary to determine whether the Applicant is in compliance with the emission limits.[19] However, the requirements for monitoring and recording the quantity of VOCs and H2S emitted during SSM/M events fail to establish a specific methodology the Applicant must use in making this measurement.

In the monitoring section for SSM/M, the proposed permit only requires the Applicant to "monitor all SSM/M events" without further specifying how the Applicant must monitor the quantity of gas vented during an SSM/M event.[20] The subsequent recordkeeping section for SSM/M events provides additional details about what types of information should be recorded but, again, the proposed permit fails to specify a methodology for collecting this information, only stating in relevant part:

> "(a) [e]ach month records shall be kept of the cumulative total of all VOC emissions related to SSM/M during the first 12 months and, thereafter of the monthly rolling 12 month total of SSM/M VOC emissions. Any malfunction emissions that have been reported in a final excess emissions report per 20.2.7.110.A(2) NMAC, shall be excluded from this tpy total…. (c) Records shall

Source Permitting (Jun. 13, 1989) at 4 (citing U.S. v. Louisiana-Pacific Corp., 682 F.Supp. 1122 (D. Colo. Oct. 30, 1987)) ("Thus, Judge Arraj found that blanket emission limits were not enforceable as a practical matter.")
[18] 21-38_AR477-481.
[19] 21-38_AR478-480.
[20] 21-38_AR479.

also be kept of the inlet gas analysis, the weight percent VOC of the gas based on the most recent gas analysis; thee volume of total gas vented in MMscf used to calculate the VOC emissions…"[21]

The proposed permit does not establish a particular methodology for quantifying the amount of emissions released during these events. Absent a required quantification methodology, the Applicant would have no obligation to monitor and consistently record these emissions according to an understood method that ensures the emissions are accurately quantified. In other words, nothing in the proposed permit would prevent the Applicant from quantifying the total emissions during SSM/M events based on more than a guesstimate. As such, the Department (and, in effect, the public) cannot be assured that the monitoring data it receives was discerned using an appropriate methodology that accurately quantifies the emissions released during SSM/M events.

The Department testified that there is, in fact, a particular methodology for quantifying emissions released during SSM/M events, which requires specific "engineering knowledge" of the interior gas volume of individual equipment undergoing SSM/M events.[22] However, during the hearing the Department admitted that this specific methodology for quantifying the volume of gas emitted during these events is not included in the proposed permit.[23]

Pursuant to the AQCA, the Environment Department may deny any application for a construction permit if it appears that the construction or modification will not meet applicable standards, rules or requirements of the AQCA or the federal act or will violate any other

[21] *Id*.
[22] NMED Exh. 25 at 13-14.
[23] Day 2 Transcript at 370.

provision of the AQCA or the federal act. NMSA § 74-2-7C.(1)(a) and (c). As discussed above, the federal act requires permit limitations established in air quality permits to be practically enforceable, and because the proposed SSM/M emission limits are not practically enforceable the Department should revise the propose permit or deny the application.

II. The Department's issuance of the proposed permit would not be in accordance with Executive Order 2005-056.

In its review of Application 5142M8 and the associated proposed permit, the Department did not satisfy its legal obligations according to New Mexico Executive Order 2005-056 ("EO 2005-056"). As a result, the Department must properly address its obligations pursuant to EO 2005-056 or deny the permit for Application 5142M8.

Administrative agencies have an implied duty to ensure its actions meet the legal standards of the New Mexico Administrative Procedures Act. *See* NMSA 1978, §§ 12-8-1 – 12-8-25. The Air Quality Control Act specifically refers to these legal standards in establishing the grounds on which a Department decision may be set aside by an appellate court. NMSA 1978, § 74-2-9C. Pursuant to this legal standard, the Department must ensure its actions are not arbitrary, capricious, or an abuse of discretion; are supported by substantial evidence in the record; and are otherwise in accordance with law. Executive Orders have the force of law and are among the laws with which the Department's actions must comply.[24]

EO 2005-056 directs the Department to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.[25] To address this legal obligation, the Department

[24] 81A C.J.S. States § 257; *see also* 81A C.J.S. States § 130b.
[25] State of New Mexico, Executive Order 2005-056: Environmental Justice (Nov. 18, 2005) at 2.

testified that it applied NMED Policy 07-13.[26] However, that policy establishes the Department's public participation policy, not an environmental justice policy that meets the obligations set forth in EO 2005-056. In fact, EO 2005-056 is never mentioned in NMED Policy 07-13 and the term "environmental justice" does not appear in the "Subject," "Purpose," "Policy," or "Reference" headings of this policy document.[27] The Department also testified that it analyzed demographic information of residents living within a 4-mile circle around the Facility using EPA's EJSCREEN tool, but the plain language of EO 2005-056 requires more than a demographic analysis – the order directs the Department to "utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities."[28]

The Department's application of NMED Policy 07-13 is insufficient to satisfy the Department's obligations according to EO 2005-056. The Department did not present testimony or evidence demonstrating it addressed its environmental justice obligations by other means. As a result, the Department's issuance of the proposed permit would not be in accordance with the law. The Department must, therefore, address its obligations pursuant to EO 2005-056 or deny the application.

III. Conclusion

Construction permits authorizing oil and gas facilities to emit air contaminants must always be developed and issued in accordance with the applicable air pollution laws and rules, but compliance with these legal requirements is even more important based on the fact that

[26] NMED Exh. 25 at 15.
[27] *See* New Mexico Environment Department, Policy 07-13: Public Participation (Feb. 6, 2018).
[28] State of New Mexico, Executive Order 2005-056: Environmental Justice (Nov. 18, 2005) at 2.

ozone levels in southeast New Mexico have and continue to reach levels that can seriously harm public health. In testimony and during the public hearing in AQB 21-38, Guardians presented an affirmative case for why the SSM/M emission limits for venting gas are not practically enforceable and, therefore, do not comply with the AQCA and the federal act. Guardians also presented an affirmative case for why issuance of the proposed permit by the Department would not be in accordance with the law because the Department failed to properly address its legal obligations pursuant to EO 2005-0056. For these reasons, Guardians respectfully requests the Cabinet Secretary direct the Department to revise the proposed permit to remedy these deficiencies or deny the permit application.

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR EIB 21-38

Findings of Fact

Procedural Facts

1. The Applicant, Crestwood New Mexico Pipeline LLC, filed Application 5142M8 with the Department on February 19, 2021.
2. According to the proposed permit, the Applicant would be authorized to increase emissions from the Willow Lake Gas Plant by 29 tpy of nitrogen oxides and 23 tpy of volatile organic compounds, among other pollutants.
3. The Department initially published the Department's legal notice for the proposed permit in the Carlsbad Current Argus on March 20, 2021, but it subsequently published a revised version of the legal notice in the Carlsbad Current Argus on April 22, 2021, which included instructions for how the public could submit comments electronically.
4. The Department initiated a new 30-day comment period starting on April 22, 2021.
5. Guardians submitted a timely public comment letter on April 16, 2021, raising issues of concern and requesting a public hearing.
6. The Department released a copy of the draft permit and the draft Statement of Basis for the proposed permit on May 28, 2021, initiating the second public comment period.
7. Guardians submitted a second set of timely public comments on June 28, 2021, renewing the concerns it raised it its first comment letter, raising new concerns, and requesting a public hearing.
8. Based on the Guardians' request for a public hearing and its demonstration of significant public interest in the proposed permit, in a Public Hearing Determination dated June 1,

2021 Cabinet Secretary James Kenney granted a public hearing for Crestwood's Application 5142M8.

9. On June 24, 2021, the Cabinet Secretary appointed Gregory Chakalian to serve as Hearing Officer in AQB 21-38.
10. On July 7, 2021, the parties attended a virtual scheduling conference, where, among other things, the Hearing Officer determined to consolidate the public hearing regarding issues related to AQB 21-38 with nine other public hearings authorized by the Cabinet Secretary to address issues related to nine separate proposed air quality permits.
11. At the request of the Hearing Officer, on August 2, 2021 the parties filed legal briefs addressing whether the public hearing may be held virtually. On August 6, 2021, the Hearing Officer issued an order finding that 20.2.72.306.C NMAC does not prohibit a virtual public hearing but directing the Department to provide a public space in which members of the public can view and participate in the virtual hearing.
12. Crestwood revised its permit application and submitted the updated version to the Department on September 14, 2021, which added a new VRU and increased the throughput of the tanks and truck loading.
13. The Department sent the revised draft permit to Guardians on September 21, 2021.
14. On October 12, 2021, the Department and the Applicant filed their first substantive responses to Guardians' public comments on the proposed permit in the form of statements of intent to present technical testimony.
15. As part of a Joint Motion in Limine filed on October 12, 2021, the Applicant requested that the Hearing Officer preclude Guardians from offering any documents, testimony, or other evidence related to 8-hour ozone National Ambient Air Quality Standards in Eddy

and Lea Counties and that any of the proposed permitting actions will necessarily "cause or contribute" to a violation of the ozone NAAQS based on the current ambient air quality in the counties.

16. On October 25, 2021, the first day of the hearing, the Hearing Officer issued an oral order granting the Applicant's Joint Motion in Limine on the basis that "[t]he [Environment] Department has no authority or discretion to deny a permit or require offsets for an individual new or modified minor source in a designated attainment area on the basis that the facility will cause or contribute to ozone levels above the NAAQS," (citing EIB Case No. 20-21 and 20-33), and that, therefore, testimony and evidence regarding whether the proposed permit would exceed the ozone NAAQS is irrelevant.
17. By the terms of the Hearing Officer's Order on the Joint Motion in Limine, Guardians was barred from offering any documents, testimony, or other evidence related to the 8-hour ozone NAAQS or whether the proposed permitting actions would cause or contribute to ozone NAAQS violations.
18. On October 25th and 26th, 2021, the Hearing Officer held a two-day virtual hearing in this matter.

Facts Regarding Proposed SSM/M Emission Limits

19. The proposed permit includes a limit restricting venting emissions as a result of startup, shutdown, maintenance and malfunction to 10 tons per year of VOCs and 1 tpy of H2S.
20. To ensure compliance with the SSM/M emission limit, the proposed permit includes compliance requirements, which, among other things, requires the Applicant to record the volume of total gas vented during SSM/M events.

21. The method for measuring the volume of gas vented during SSM/M events is not included in the draft permit.

Facts Regarding the Executive Order 2005-056

22. The Department testified that it addressed the issue of environmental justice and New Mexico Executive Order 2005-056 according to NMED Policy 07-13.
23. NMED Policy 07-13 is the Department's policy regarding public participation.
24. There is no language in NMED Policy 07-13 that refers to or addresses New Mexico Executive Order 2005-056.
25. The record contains no evidence to indicate that the Department used any other means to address its obligations under Executive Order 2005-056 other than applying NMED Policy 07-13.

Conclusions of Law

General Conclusions of Law

26. The Record Proper and any part thereof shall be evidence.
27. The "Record Proper" means the Administrative Record and all documents filed by or with the Hearing Clerk.
28. The "Administrative Record" means all public records used by the Division in evaluating the application or petition, including the application or petition and all supporting data furnished by the applicant or petitioner, all materials cited in the application or petition, public comments, correspondence, and as applicable, the draft permit and statement of basis or fact sheet, and any other material used by the Division to evaluate the application or petition.

29. The Applicant must prove that the proposed permit should be issued and not denied. This burden does not shift.
30. The Department has the burden of proof for a challenged condition of a permit which the Department has proposed.
31. For permit conditions challenged as inadequate, improper, and invalid, Guardians has the burden of going forward to present an affirmative case on the challenged condition.
32. The Secretary and the Department must ensure that its administrative action is not arbitrary, capricious, or an abuse of discretion; supported by substantial evidence in the record; and otherwise in accordance with law.
33. A ruling by an administrative agency is arbitrary and capricious if it is unreasonable or without a rational basis, when viewed in light of the whole record.
34. Pursuant to NMSA Section 74-2-7.C, the Department may deny an application for a construction permit if it appears that the construction: (a) will not meet applicable standards, rules or requirements of the State or Federal Acts; (b) will cause or contribute to air contaminant levels in excess of a national or state standard; or (c) will violate any other provision of the State or Federal acts.
35. Pursuant to 20.2.72.208 NMAC, the Department shall deny an application for a permit if, after considering emissions after controls: (A) It appears that the construction, modification or permit revision will not meet applicable regulations adopted pursuant to the Air Quality Control Act; (B) The source will emit a hazardous air pollutant or an air contaminant in excess of any applicable New Source Performance Standard or National Emission Standard for Hazardous Air Pollutants or a regulation of the board; (C) For

toxic air pollutants, see 20.2.72.40 NMAC – 20.2.72.499 NMAC; (D) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of any National Ambient Air Quality Standard or New Mexico ambient air quality standard unless the ambient air impact is offset by meeting the requirements of either 20.2.79 NMAC or 20.2.72.216 NMAC, whichever is applicable; (E) The construction, modification, or permit revision would cause or contribute to ambient concentrations in excess of a prevention of significant deterioration (PSD) increment; (F) Any provision of the Air Quality Control Act will be violated; (G) It appears that the construction of the new source will not be completed within a reasonable time; or (H) The department chooses to deny the application due to a conflict of interest in accelerated review as provided for under Subsection C of 20.2.72.221 NMAC.

Conclusions of Law Regarding Proposed SSM/M Emission Limits

36. Permit limitations established in an air quality construction permit issued pursuant to an EPA-approved State Implementation Plan must be practically enforceable.
37. EPA guidance sets out three primary enforceability criteria which a source-specific permit must meet to make the permit limitations enforceable as a practical matter, including: (1) a technically accurate limitation and the portions of the source subject to the limitation; (2) the time period for the limitation; and (3) the method to determine compliance including appropriate monitoring, record keeping and reporting.
38. The proposed permit limitations for SSM/M venting events do not specify a method for measuring the total quantity of pollutants emitted during these events, and these emissions are, therefore, not practically enforceable.

39. A permit limitation that is not practically enforceable violates the federal Clean Air Act, and the Department should, therefore, deny the permit application.

Conclusions of Law regarding Executive Order 2005-056

40. Executive Order 2005-056 directs all relevant cabinet level departments and boards, including the Environment Department, to utilize available environmental and public health data to address impacts in low-income communities and communities of color as well as in determining siting, permitting, compliance, enforcement, and remediation of existing and proposed industrial and commercial facilities.
41. The Department did not address its legal obligations under EO 2005-056 by using available environmental and public health data to address impacts to low-income communities and communities of color as well as in determining the permitting of the Willow Lake facility.
42. The Department's issuance of the proposed permit without the Department properly addressing its legal obligations under EO 2005-056 would be unlawful, and the proposed permit should, therefore, not be approved.

Respectfully submitted this 1st day of December, 2021,

/s/ Matthew A. Nykiel
Matthew A. Nykiel
WildEarth Guardians
3798 Marshall St., Ste. 8
Wheat Ridge, CO 80033
mnykiel@wildearthguardians.org

Attorney for WildEarth Guardians

CERTIFICATE OF SERVICE

I certify that a true and exact copy of **WILDEARTH GUARDIANS' POST-HEARING SUBMITTAL** was served on December 1, 2021 via email to the persons listed below:

Pamela Jones
Madai Corral
Hearing Clerk
New Mexico Environment Department
PO Box 5469
Santa Fe, NM 87502
madai.corral@state.nm.us
pamela.jones@state.nm.us

Chris Vigil
Office of General Counsel
New Mexico Environment Department
121 Tijeras Avenue, Suite 1000
Albuquerque, NM 87102
christopherj.vigil@state.nm.us

Attorney for New Mexico Environment Dept.

Courtney M. Shephard
Eric P. Waeckerlin
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth St., Ste. 2200
Denver, CO 80202
cshephard@bhfs.com
ewaeckerlin@bhfs.com

Attorneys for Crestwood New Mexico Pipeline LLC

/s Matthew A. Nykiel
Matthew A. Nykiel